No. 678

JOHN F. DAVIS, CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1968

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**FLAMBEAU PLASTICS CORPORATION,**
*Petitioner,*

vs.

**NATIONAL LABOR RELATIONS BOARD,**
*Respondent*

and

**LOCAL NO. 380, INDUSTRIAL UNION, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO,**
*Intervenor.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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*To The Justices Of The Supreme Court Of The United States:*

Flambeau Plastics Corporation, Petitioner herein, respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for

the Seventh Circuit, entered on August 29, 1968, denying Flambeau Plastic Corporation's petition to review an Order of the National Labor Relations Board dated October 12, 1967 and granting the National Labor Relations Board's Cross-Petition for enforcement of that same Order.

## OPINIONS BELOW

The decision and order of the National Labor Relations Board, hereafter "Board," is reported at 167 NLRB No. 102 (1967). The decision of the Court of Appeals is reported at ..... F.(2d) ....., 58 CCH Lab. Cas., Par. 12,864, and is presented in the Appendix hereto at pp. App. 18-19.

## JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was made and entered on August 29, 1968, and a copy thereof is printed in the Appendix at pp. App. 20-23.

The jurisdiction of this Court is invoked pursuant to 28 USC §1254(1).

## QUESTIONS PRESENTED

The questions presented here are both important to the future administration of the National Labor Relations Act in that they relate to the rights of labor and management when their dispute is resolved in the penumbra of the legislation. This case gives the Court the opportunity to clearly enunciate on the following substantive questions:

1. Where there is clear and uncontroverted proof on the record that a minority of employees supported a strike at the outset and in due course, acting on this evidence the employer withdrew recognition of the union, should the employer be found guilty of violating §8(a)(5) and ordered to reinstate recognition on the ground that it has also been found guilty of other well articulated and technical violations of the Act.

2. Is an employer guilty of violating §8(a)(3) within the rationale of *NLRB* v. *Great Dane Trailers*, 388 U.S. 26, where he denies paid vacations to strikers during the progress of the strike even though vacation and pay therefor do not accrue under the expired bargaining agreement or the continuing practice, the strikers were ineligible for vacations or pay therefor and the employer's denial is based upon good faith belief it was asserting its contract rights.

## PROCEEDINGS BELOW

These proceedings grow out of an unfair labor practice charge filed by Local No. 380, Industrial Union, Allied Industrial Workers of America, AFL-CIO (hereafter "Union") on February 18, 1966. This charge was amended on May 3, 1966 and thereafter, on July 8, 1966 the Board issued its complaint (No. 30-CA-351). On August 19, 1966 the hearing opened. Prior to decision by the Trial Examiner, the Union filed an additional charge and an additional complaint was issued (No. 30-CA-455). A motion was made by General Counsel for the Board and granted to reopen the earlier cases and consolidate the later complaint with it. The supplemental hearing was then held.

On May 25, 1967 the Trial Examiner issued his decision finding Petitioner guilty of all charges except one upon which he made no ruling.

Upon exceptions being filed by all parties on October 13, 1967, the Board affirmed the Trial Examiner and additionally found Petitioner guilty of the charge which the Trial Examiner had overlooked.

Petitioner sought a review of the Board's order in the Court of Appeals for the Seventh Circuit and the Board cross petitioned for enforcement. On August 2, 1968, the Court of Appeals rendered its decision denying review and granting the Board's demand for enforcement. The Court's judgment was entered August 29, 1968.

## STATUTES INVOLVED

The pertinent portions of the National Labor Relations Act (hereafter "Act") (61 Stat. 136, 29 USC 151, et seq.) are as follows:

> "Section 8(a). It shall be an unfair labor practice for an employer . . .
>
> "(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;
>
> "(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment, to encourage or discourage membership in any labor organization; . . .
>
> "(5) to refuse to bargain collectively with the representatives of his employees . . . . "

## STATEMENT OF THE CASE

On March 5, 1963, the Union was certified as the collective bargaining agent of certain employees at Petitioner's Baraboo, Wisconsin, plant.

Following collective bargaining, on May 17, 1965 the Company and Union entered into a contract covering wages, hours and conditions of employment. The contract term was for one year ending May 17, 1966.

On May 15, 1966, employees attending a Union meeting voted 51 to 3 to strike. On June 5, 1966, another strike vote was taken and employees present voted 66 to 1 to strike.

On June 15, 1966, 91 of the 212 unit employees went out on strike.

Prior to June 15, the Union had filed two unfair labor practice charges with the Board. The first of these claimed that the Company refused to bargain because an Employee Handbook which had been issued, in more or less the same form, since 1960 and *about* which the Union had never previously complained or requested to bargain was denigrating to the Union. The second charge concerned the Company's formulation of a training program about which it had submitted questions in the form of a Unit Clarification Petition to the Board. Although *implementation* of the program was not at issue, the Union charged that the Company had a duty to bargain about the mere *formulation* of the program before submitting it to the processes created by the Act.

Additionally, after the strike began the Union charged and the Board complained that Petitioner had refused to bargain in good faith during negotiations intended to lead to a new contract; had attempted to bargain directly with employees; had illegally assisted non-strikers in resigning from the union; had illegally surveyed the picket line by taking pictures of strikers; had intimidated strikers by advising non-strikers that it had a record of non-employees who picketed; had increased wages faster than it had offered the union in negotiations; had told prospective employees it would never accede to union demands; and had threatened a strike with retaliation.

During the course of the strike, a number of strikers returned to work at Flambeau, others found employment elsewhere and many new employees were hired. On September 8, 1966, there were 64 strikers believed to be available to return to work and there were 115 permanent employees working in the plant. On September 15, 1966, the Company withdrew recognition from the Union.

Consistent with its long-established practice, the Company agreed with the Union's request to insert a vacation clause in the 1965 contract. As written, this clause limited eligibility for vacation pay to those employees continuously on the payroll for the year preceding August 1 and who "work up and through the last scheduled workday prior to the declared vacation period." The contract further stated that "vacation pay is incidental to vacation time off and is not considered to accrue for each day or month of employment." Although the contract had expired, the Company scheduled vacations under the terms of its contract in 1966. These vacations were scheduled and taken starting on August 1, 1966. As striking employees had not worked "up and through" the last working day prior to August 1, 1966 and had no accrued rights under the contract they did not receive vacation pay unless they had returned to work during the year.

As noted *supra,* the Board found Petitioner guilty of all charges. On appeal pursuant to Section 10(f) of the Act, the Court below affirmed specifically holding the withdrawal of recognition a violation of §8(a)(5) and the denial of vacation pay to strikers a violation of §8(a)(3).

The Court below granted enforcement of the Board's order without modification.

## REASONS FOR GRANTING THE WRIT

### A. The Question of Withdrawal of Recognition.

It is generally the rule that where the employer has independent and substantial evidence which raises a good faith doubt in his mind as to the majority status of the Union, he is free to withdraw recognition or, at his option, to file a representation petition under Section 9(c)(1)(B) of the Act one year after certification of a Union. See *Brooks* v. *NLRB*, 348 U.S. 96 (1954).

> "The question of whether an employer is acting in good or bad faith at the time of the refusal (to bargain) is . . . one which of necessity must be determined in the light of all relevant facts in the case." *Joy Silk*, 185 F. (2d) 732, 185 F. (2d) at 742 (C.A.D.C. 1950) *cert. den.* 341 U.S. 914.

The existence of the "good faith" requirement is determined by the judicial combination of the extrinsic record evidence which led to the employer's decision to act as he did and the acts of the employer which preceded the withdrawal of recognition. E.g., *Franks Bros. Co.* v. *NLRB*, 321 U.S. 702 (1944).

It is recognized that because it is illegal for an employer to interrogate his employees as to their union sympathies, the employer may rely on extrinsic evidence in an effort to determine the degree of union support among unit employees. See *Stoner Rubber Co.*, 123 NLRB 1440 (1959) where the Board said, at p. 1445:

> "An employer can hardly prove that a union no longer represents a majority since he does not have access to the union's membership lists and direct interrogation of employees would probably be unlawful as well as of dubious validity. Accordingly, to overcome the

presumption of majority the employer need only produce sufficient evidence to cast serious doubts on the union's continued majority status."

It cannot be said that there was not ample evidence to show the employer that employee support for the Union was waning:

On May 4, 1966, a union shop referendum, required under Wisconsin law, indicated Union support of 113 to 21.

On May 15, 1966, only 54 unit employees showed up at a strike-vote meeting.

On June 5, 1966, only 67 unit employees bothered to show up at another strike-vote meeting.

On June 15, 1966, *less than one-half* of the unit employees walked out on strike.

On September 8, 1966, there were only 64 strikers who were believed available to return to work and there were 115 working employees. Only about *one-third* of the unit employees were on strike.

During oral argument before the Court below, Judge Swygert inquired, "Aren't unions now a fact of life?" Of course they are, but so is employee *free choice.* It is respectfully submitted that Congress, in drafting the Taft Hartley Act, intended to protect the rights of employees to have or to reject unionization. Flambeau's employees have clearly rejected the Union on the basis of the facts enumerated above.

The Courts of Appeal have consistently held that the *mere existence* of 8(a)(1) violations does not *ipso facto* negate the Company's good faith doubt of the Union's majority status where there is substantial extrinsic evidence showing the loss of the Union's majority status. See, e.g., *NLRB* v. *Hannaford Bros. Co.,* 261 F. (2d) 638 (CA

1, 1958); *NLRB* v. *United Mineral & Chemical Corp.*, 391 F. (2d) 829 (CA 2, 1968); *NLRB* v. *S.S. Logan Packing Co.*, 386 F. (2d) 562 (CA 4, 1967); *NLRB* v. *Florida Citrus Canners Co-op*, 288 F. (2d) 630 (CA 5, 1961); *Hill-Behan Lumber Co.* v. *NLRB*, 396 F. (2d) 807 (CA 5, 1968); *Pulley d/b/a Capitol-Varsity Cleaning Co.* v. *NLRB*, 395 F. (2d) 870 (CA 6, 1968); *NLRB* v. *Ben Duthler, Inc.*, 395 F. (2d) 28 (CA 6, 1968); *Indiana Rayon Corp.* v. *NLRB*, 355 F. (2d) 535 (CA 7, 1966); *NLRB* v. *C. L. Frank, Inc.*, 351 F. (2d) 35 (CA 7, 1965).

On the other hand, when an employer embarks on a *planned* and *aggressive* campaign to destroy the Union, it is said that he has no good faith doubt of the Union's majority status. See, *Medo Photo Supply Corp.* v. *NLRB*, 321 U.S. 678 (1944) (the employer accepted employees' offer to quit the union in return for higher wages) and *Franks Bros Co.* v. *NLRB, supra* (the employer threatened to close down if the union won an election).

It would appear that the Court below, contrary to its own prior rulings and contrary to the rule of the other circuits, has failed to weigh "all relevant facts" and resorted to an *ipso facto* rule. Any realistic analysis of the melange of charges here would indicate that doctrine and rule were stretched by the Board to bring about the result of illegality. For example, it was recognized that Petitioner did not solicit union resignations. Petitioner discharged no one during the strike. Every action which was found to be illegal gathered its character from a prior decision of the Board by the same Trial Examiner and the building of one inference upon another.

It is submitted that a departure from existing and accepted rule has been made by the decision below. In addition, it is submitted that the decision below has determined an important issue involving federal law which has

not been, but should be, settled by this Court. On the undisputed facts, what has happened here is that the Board remedy of ordering reinstatement of recognition in the name of effectuating the policies of the Act has effectively frustrated a majority of employees in the enjoyment of their rights guaranteed under §7 of the Act to refrain from collective action.

**B. The Vacation Issue.**

Under the terms of the 1965 agreement:

> "Employees who during the year preceding August 1 were continuously on the payroll of the Company for the previous year and work up and through the last scheduled workday prior to the declared vacation period, will be eligible for vacation time off and pay . . . . "

In 1966, vacations were scheduled to begin August 1, 1966. As the strike had commenced on June 15, 1966, the Company did not give vacation pay to strikers as they had not worked "up and through the last scheduled workday prior to" August 1, 1966 and, therefore, the Company considered these employees ineligible for vacation pay.

The Board refused to give credence to the Company's interpretation of the agreement and ordered the Company to pay vacation benefits to striking employees. Essentially, the Board ruled that the Company had not fulfilled the test in *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967). There this Court ruled that where an employer's entire work force was eligible for vacation benefits *which had accrued* under an expired contract and where the employer had paid these benefits only to non-striking employees, his act was discriminatory and he must come forward with evidence

> "to establish that he was motivated by legitimate objectives . . . . " 388 U.S. at 34.

First, the parties stated in the Flambeau Agreement that they intended to provide for time off from active employment.

Second, it should be noted that under the terms of the Flambeau Agreement, vacation pay *does not accrue* during the year:

> "Vacation pay . . . is not considered to accrue for each day or month of employment."

Third, under Wisconsin law it is recognized that the parties to a labor agreement are free to limit eligibility for vacation (or other) benefits, even though the result of such limitation is payment of those benefits to non-strikers and not to strikers.

> " ' . . . accrual is qualified . . . ' by various conditions in the contract like employee status on the eligibility date and these conditions must also be met." *Briggs* v. *Electric Auto-Lite Co.*, 37 Wis. 2d 275, at 279, 155 NW 2d 32 (1967).

In *Valeo* v. *J. I. Case Co.*, 18 Wis. 2d 578, 119 NW 2d 384 (1962), strikers who were eligible for vacation pay under the expired contract were denied those benefits. In *Briggs, supra*, the Wisconsin Supreme Court pointed out that had the strikers in *Valeo* not been eligible for vacation benefits under the terms of the contract, they would not have received the benefits.

The Board itself has recently pointed out that, under the proper circumstances, *Great Dane Trailers* might lead to what is indicated in *Briggs, supra.*

> "*Great Dane Trailers* (does not preclude) reliance on the often stated axiom that an employer need not remunerate strikers for work not performed." *Kimberly Clark Corp.*, 171 NLRB No. 82, 1968-1 CCH NLRB Par. 22, 492 (May 21, 1968).

It is respectfully submitted that Flambeau has completely fulfilled its burden to show its "legitimate objectives" in refusing to make vacation payments to striking employees as the Company need only point to the contract to establish the legitimacy of its action. Under both Wisconsin and Board law, these contractual restrictions are clearly legal. By its action in requiring Flambeau to make vacation payments to the strikers, the Court below has abrogated the Wisconsin law and has raised a serious question of federal law which should be answered by this Court.

### C. The Questions Presented are Important to the Administration of the National Labor Relations Act and Should Be Resolved by This Court.

In Section 7, the Act gives employees the right to participate or to refrain from participating in concerted activities. By failing to balance the overwhelming nature of the evidence of lack of employee support for the union against the comparatively trivial nature of the unfair labor practices found here, the Board and the Court below fail to adequately consider the employees' right to free choice and, instead, impose unionization upon those employees by a remedy supposed to effectuate the policies of the Act.

Similarly, when those employees *do* chose unionization, they have a right to make an agreement through the collective bargaining process. This agreement must (if legal) be upheld as written and as intended. With regard to the vacation issue, it is patently obvious that neither the Board nor the Court below interpreted the Agreement as intended by the parties nor as established in past practice. In the rather extensive litigation which has evolved from this issue, it seems that there is great disagreement as to precisely what this Court meant when it said in *Great Dane*

*Trailers, supra,* that the employer must step forward showing "legitimate objectives" for his granting benefits to non-strikers and not to strikers. It is respectfully submitted that this case would give this Court an excellent opportunity to outline precisely what "objectives" are "legitimate" to such a situation. Such a determination will tend to limit litigation through the clear and precise definition of these terms.

## CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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